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IN THE

Supreme Court of the United States

October Term, 1950

No. 435

SANTOS MIGUEL, *Petitioner*,

v.

J. RAYMOND McCARL, *Comptroller General of the United States*

and

FREDERICK W. COLLMAN, *Chief of Finance, United States Army, Respondents*.

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia, and Brief in Support Thereof

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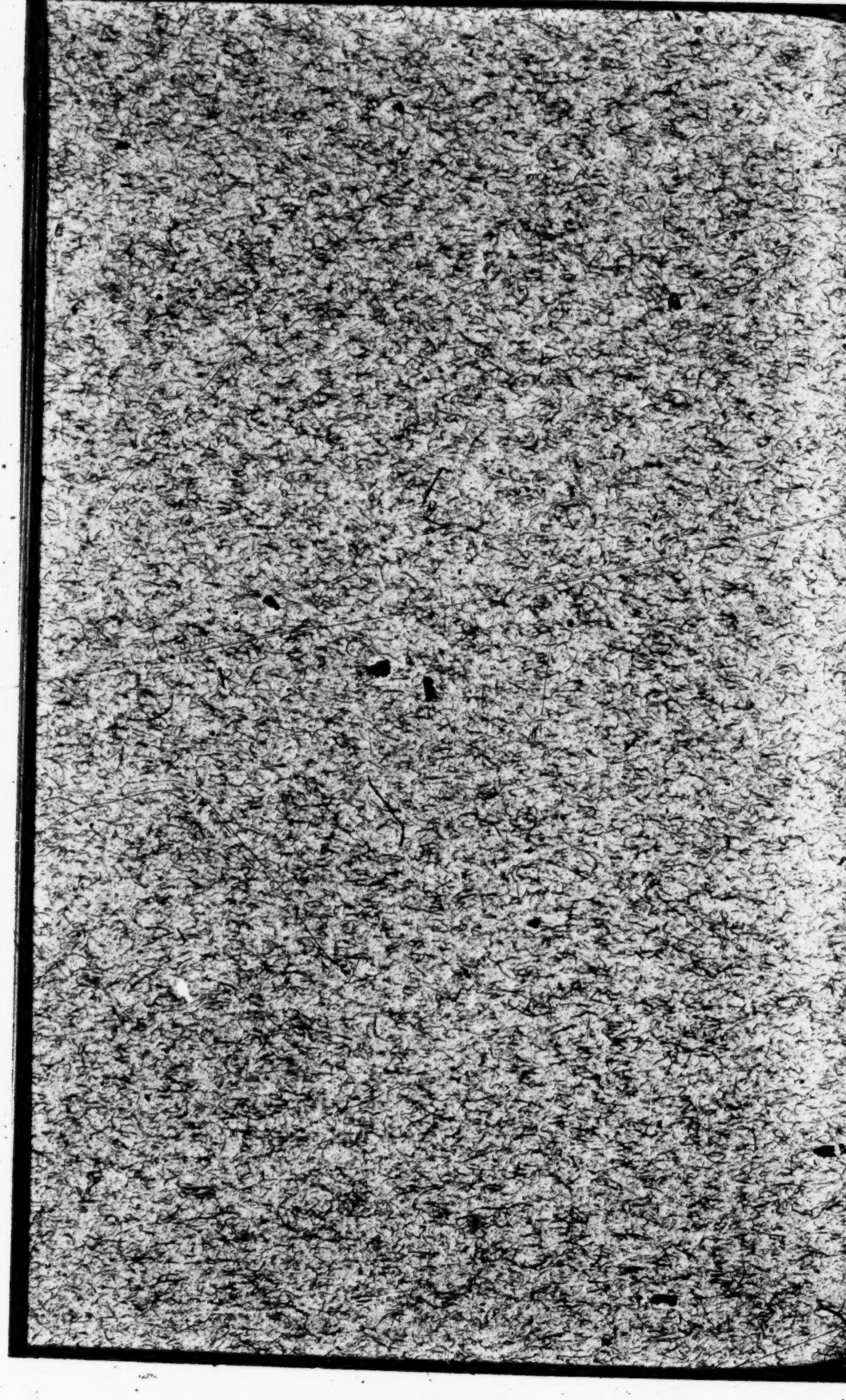

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IN THE

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OCTOBER TERM, 1933.

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and

FREDERICK W. COLEMAN, *Chief of Finance, United States Army, Respondents*

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Santos Miguel, prays a writ of certiorari to review the final judgment of the Court of Appeals of the District of Columbia in this case, entered June 26, 1933, reversing a judgment of the Supreme Court of the District of Columbia entered September 16, 1932.

QUESTIONS PRESENTED

1. Has the Comptroller General of the United States jurisdiction to review the order of the President acting through the Secretary of War, retiring with pay, after thirty years' service as an enlisted man of the United States Army, a Philippine Scout enlisted in the Army under section 36 of the act of February 2, 1901, 31 Stat. 757?

2. If the Comptroller General has jurisdiction to review such order of the President, is the right of an enlisted man of the Philippine Scouts, after thirty years' service, to retirement with pay so clear as to render the decision *contra* of the Comptroller General subject to correction by mandatory injunction?

The Supreme Court of the District of Columbia failed to answer question 1, but answered question 2 (in effect) in the affirmative and enjoined the Comptroller General against interfering with payment to the petitioner of retired pay as established by the Secretary of War. (R. 8-9, 25-26.) Upon appeal therefrom, the Court of Appeals of the District of Columbia inferentially answered question 1 in the affirmative and question 2 in the negative and, reversing the decree of the Supreme Court, directed that the petitioner's bill be dismissed (R. 39).

Petitioner contends that the answer to question 1 should have been that the Comptroller General had no power to review the order of the President, which would have made answer to question 2 unnecessary. But, plaintiff contends further that, even though the answer to question 1 be that the Comptroller General did have power to review the order of the President, the answer to question 2 should have been that the right of such enlisted member of the Philippine Scouts to retirement with pay is so clearly authorized under the statutes and applicable executive circular that the decision *contra* of the Comptroller General was arbitrary, capricious and unreasonable and therefore subject to correction by mandatory injunction.

STATUTES, EXECUTIVE CIRCULAR AND WAR DEPARTMENT SPECIAL ORDER INVOLVED

A. *Statutes:*

(1) The act of March 2, 1907, 34 Stat. 1217, provides:

> "When an enlisted man shall have served thirty years either in the Army, Navy or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *; *Provided*, That in computing the necessary thirty years, all service in the Army, Navy or Marine Corps shall be credited."

This act is, for the purpose of this cause, a reenactment of the act of February 14, 1885, 23 Stat. 305, which is set out in the appendix (Appendix, *infra*, p. 29).

(2) Section 36 of the act of February 2, 1901, 31 Stat. 757, provides:

> "That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands *for service in the Army*, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, *for the Regular Army*. The President is further authorized, in his discretion to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, *together with such native force*, shall not exceed at any one time one hundred thousand.
>
> * * * * * * * * *
>
> "The pay, rations, and clothing allowance to be authorized for the enlisted men shall be fixed by the Sec-

retary of War, and shall not exceed those authorized for the Regular Army." (Italics supplied.)

(3) The act of May 10, 1926, 44 Stat. 496, amended section 36, *supra*, as follows:

"The pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts shall be fixed by the Secretary of War, and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army."

(4) Sections 1 and 2 of the National Defense Act of June 3, 1916, as amended by the act of June 4, 1920, 41 Stat. 758, provide:

"Sec. 1. That the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps.

"Sec. 2. COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States shall consist of the Infantry, the Cavalry * * *; *the officers and enlisted men of the retired list;* and such other officers and enlisted men as are now or may hereafter be provided for. Except in time of war or similar emergency when the public safety demands it, the number of enlisted men of the Regular Army shall not exceed two hundred and eight thousand, *including the Philippine Scouts.*" (Italics supplied.)

(5) The Army Appropriation Act of February 12, 1925, 43 Stat. 892, 895, (in force when the act of May 10, 1926, (3) *supra,* was passed) provides in pertinent part as follows:[1]

[1] Similar appropriation "for pay of retired enlisted men" appears in every annual Army Appropriation act since 1887 to date.

"PAY, AND SO FORTH, OF THE ARMY

* * * * * * * * * *

PAY OF PERSONS WITH RETIRED STATUS:

* * * * * * * * *

For pay of retired enlisted men, $8,028,925.

* * * * * * * * *"

(6) The act of June 4, 1920, 41 Stat. 766, provides:

"The Chief of Finance, under the authority of the Secretary, shall be charged with the disbursement of all funds of the War Department, including the pay of the Army and the mileage for officers and the accounting therefor; and with such other fiscal and accounting duties as may be required by law, or assigned to him by the Secretary of War."

(7) The Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 23, 24, provides as follows:

"Sec. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. * * *

Sec. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discon-

tinued, except as to settlements made before July 1, 1921.

Sec. 305. Section 236 of the Revised Statutes is amended to read as follows:

> 'Sec. 236. All Claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.' "

(8) Section 8 of the Act of July 31, 1894 (The Dockery Act), 28 Stat. 208, provides:

> "Disbursing officers; or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement."

B. *Executive Circular:*

Paragraph II, War Department Circular No. 41, issued September 21, 1931, reads as follows:

> "*Retired pay and allowances of Philippine Scouts.*—Under the provisions of the act of February 2, 1901, as amended by the act of May 10, 1926 (44 Stat. 406), the retired pay and allowances of members of the Philippine Scouts are fixed as follows:
>
> 1. *Pay.*—Seventy-five per cent (75%) of the base pay and the longevity pay received by them on the active list at the time of their retirement.
>
> 2. *Allowances*—
>
> a. Six dollars and thirty-five cents ($6.35) per month in lieu of rations and clothing, and
>
> b. Four dollars and fifteen cents ($4.15) per month in lieu of quarters, heat and light. (A. G. 220.85 (4-3-31)"

C. *War Department Special Order:*

"35. Master Sergeant Santos Miguel, P-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service. QM 1600 A 211-2 (A. G. 220.85.) (4-3-21)

"By order of the Secretary of War.

"DOUGLAS MACARTHUR,
"General,
"Chief of Staff"

STATEMENT

Petitioner, Santos Miguel, first enlisted October 1, 1901, in the United States Army under the act of February 2, 1901, *supra*, p. 3, authorizing the President in his discretion to "enlist natives * * * for service in the Army", and was assigned to the Philippine Scouts. He reenlisted in the Army from time to time upon the expiration of his various enlistments until he had served continuously in the Philippine Scouts more than thirty years. Thereafter, upon his written application to the President (R. 4-2), he was placed upon the retired list by order of the Secretary of War, October 31, 1931, *supra*, p. 7, under the provisions of the act of February 14, 1885, as reenacted and amended by the act of March 2, 1907, *supra*, p. 3, with pay as fixed by the Secretary of War under the act of May 10, 1926, *supra*, p. 4.

Petitioner presented his retired pay voucher for the month of November, 1931, correct and in accord with the rates so fixed (War Department Circular No. 41, *supra*, p. 6), to his proper disbursing officer at Manila for payment (R. 2). The disbursing officer, instead of honoring the voucher and paying petitioner the retired pay and allowances shown due him thereby, addressed a letter dated November 5, 1931, to the Comptroller General, stating that he had reasonable doubt as to the authority in the Secre-

tary of War to retire petitioner or to fix his retired pay and allowances (R. 12).

The Comptroller General on January 19, 1932, rendered his "advance" decision to petitioner's disbursing officer holding that "*the retirement of enlisted men of the Philippine Scouts is not authorized by the remotest implication of the laws*" and that, accordingly, payment was not authorized. (R. 18-22.) On April 27, 1932, the petitioner began this action in the Supreme Court of the District of Columbia.

OPINION AND JUDGMENT OF THE SUPREME COURT

On June 10, 1932, the respondents having moved to dismiss petitioner's bill and after oral argument by petitioner's present counsel and by attorneys of the General Accounting Office for the Comptroller General and by an officer of the Judge Advocate General's Department, United States Army, for the Secretary of War as *amicus curiae*, Mr. Justice Adkins overruled the motions to dismiss holding that: (1) Enlisted men of the Philippine Scouts are members of the United States Army and eligible to retirement as such; plaintiff was, therefore, lawfully retired by appropriate order of the Secretary of War October 31, 1931; (2) plaintiff being a retired enlisted man of the Army, the appropriation "for the pay of retired enlisted men" was available to pay him; (3) The duty of payment was ministerial and the court had authority to compel its performance. (R. 8-9.)

Thereafter respondents filed separate answers to petitioner's bill (R. 9-18). On July 16, 1932, Mr. Justice Letts sustained petitioner's motion to strike the answers because "An examination * * * fails to disclose any issue of fact other than as raised by admitted facts. As to such issues, the law of the case was settled by Mr. Justice Adkins as shown by the memorandum filed herein on June 10, 1932" (R. 25). The respondents having elected to stand on the

record, on September 16, 1932, pursuant to stipulation, Mr. Justice Adkins entered a final decree of injunction as prayed by petitioner (R. 25-26). Respondents appealed therefrom to the Court of Appeals of the District of Columbia (R. 26).

OPINION AND JUDGMENT OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

By its opinion filed June 26, 1933, the Court of Appeals reversed the judgment of the trial court and remanded the cause with directions to dismiss the bill, holding by inference but without reasoning its conclusion, that the Comptroller General had jurisdiction to review the President's order herein; that he was required by law to render such decision, which was conclusive upon the executive; that said decision involved "the character of judgment or discretion" and was not subject to control by mandamus; and that petitioner's status being doubtful, his only remedy lay in the Court of Claims: the Court (Mr. Justice Groner) saying, *inter alia*:

> "* * * But where, in a case like this, there is in good faith a contest on the question whether petitioner is a retired soldier of the Army, or whether, even if he is, his right to pay is fixed by an appropriation with relation to enlisted men 'in the Army, Navy, or Marine Corps', or where, as in this case is stated under oath by the Comptroller, there are no funds available, it is clear, we think, that neither mandamus nor injunction should issue. * * *
>
> "Nor do we think the order of retirement directed by the Secretary of War is a conclusive finding of fact of the status of petitioner. So far as appears, it was a routine matter, but whether routine or not, it was effective only if authorized by law. Congress alone can make appellee a retired soldier of the Army of the United States. * * * We think it is a misconception, therefore, to say that because of the retirement order of the Secretary the question of appellee's status may

not be inquired into, and we think in the circumstances we have shown, the Comptroller's decision was binding until reversed or set aside by a proper proceeding in a court having jurisdiction of the controversy and of the parties, and we do not think this is such a proceeding."

The entire opinion appears in the Record at pages 32-38.

PETITIONER'S CONTENTIONS

(1) The petitioner contends, first, that the Comptroller General had no power to render any "decision" reviewing the order of the President retiring petitioner with pay. Retirement of Army personnel is a function of command, committed by the Constitution and the statutes to the President. Being so committed, and there being no provision for review of his decisions thereon, determination by the President of the eligibility of a member of the Army to retirement is final and conclusive against all executive officers of the Government, including the Comptroller General; and is not subject to review by the courts unless arbitrary, capricious or unreasonable. The Comptroller General is, then, without jurisdiction to go behind such determination of an enlisted man's eligibility to retirement, or to render nugatory the President's act done through his constitutional organ for military administration, the Secretary of War, in placing him upon the retired list.

(2) The petitioner contends *arguendo* that, even assuming that the Comptroller General acted within his jurisdiction in viewing said act of the President, his "decision" was arbitrary, capricious and unreasonable. Petitioner was an enlisted man in the United States Army. The statutes determining his status as such were so clear as to admit no other interpretation. Congress had appropriated money "for the pay of retired enlisted men" which was available to pay petitioner. A court of equity, upon arbitrary denial of such pay by the Comptroller General, has jurisdiction to grant relief by injunction.

REASONS FOR GRANTING THE WRIT

1. This case presents a basic and important question of federal administrative law which has never been decided by this court. The question stated generally is whether the Comptroller General, by refusing to approve payments incident to lawfully created status, may control the administration of government as undertaken by the President and the established executive departments within the scope of the authority conferred upon them by the Constitution and other laws of the land. More particularly presented, the question is, are the orders and decisions of the President as Chief Executive and Commander in Chief of the Army, through his *alter ego,* the Secretary of War, made within their proper legal competency, final and conclusive upon the Comptroller General? The War Department since 1789 has had entire control of the Army. The Secretary of War, as the representative of the President, has great and exclusive powers placed upon him by the Constitution. Now for the first time to permit an establishment which declares itself independent of and not responsible to the President, a mere accounting office, lacking all practical and judicial experience in military affairs, to overrule orders of the President intimately associated with his power of command of the Army; an office which presumes to override the decision of the Chief Executive and Commander in Chief as to the status in the Army of a component thereof, is a grave proposition so deviating from the uniform course of past decisions of this and other federal courts as to require examination by this Court before it be allowed to stand as established law. The Solicitor General recognized the gravity of this situation when he directed that there be appended to the brief of the Comptroller General in the court below his statement which reads in part as follows:

> *"The case is of importance in its relation to the respective powers of the Executive and Accounting Offices of the Government".* (Italics supplied.)

2. A paramount reason for allowing the writ of certiorari, however, is the extraordinary importance of the case as measured by its influence upon the national defense. Petitioner alleged that (R. 4) "the said unlawful interference of defendant, J. Raymond McCarl, has resulted and is resulting in irreparable injury to the plaintiff and so affects the important component of the Army to which plaintiff belongs as to do injury to the morale of said component of the Army and to embarrass military administration". The Chief of Finance, in his sworn answer, admits (R. 23): that there are a considerable number of enlisted men of Philippine Scouts who have completed, or are about to complete thirty years' service in the Army, and *that the decision rendered and position taken by defendant McCarl do and will injuriously affect the morale of a component part of the Army, to wit, the Philippine Scouts*". (Italics supplied.) In the exhaustive brief filed in the Court of Appeals by *amici curiae* representing the Secretary of War appears the following:

> "The War Department is gravely apprehensive of the effect of the advance decision of the Comptroller General upon the morale of the Philippine Scouts. * * * it is, perhaps, too much to expect that the accounting officers * * * will * * * appreciate the intense * * * pride of an Oriental people. The British failed in this respect until the Sepoy Mutiny of 1857 taught them to be wary. We should profit by their bitter lesson.
>
> * * * * * * * * * *
>
> "There is a greater, a more important consideration to the government than a mere sum of money. The morale of its troops upon its last frontier, and the keeping of the faith with these men who have upheld its hands for 30 years, are considerations * * * that must not be ignored.
>
> "These considerations * * * are urged as having the most important bearing upon the real interest of the United States, and as pointing the duty of the

court, when satisfied on the law, to act with firmness and celerity.

* * * * * * * * *

"*The principles involved in this case are vital to the War Department. They are vital to constitutional government* * * *". (Italics supplied.)

It is submitted that the court should grant *certiorari* in this case almost as a matter of course under paragraph 5c of Rule 38.

Petitioner respectfully urges that the questions presented should be finally settled and determined by this court, and prays that this petition be granted.

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BRIEF IN SUPPORT OF PETITION

OPINIONS

The memorandum opinions of the Supreme Court of the District of Columbia overruling respondents' motions to dismiss and sustaining petitioner's motion to strike respondents' answers, filed June 10 and July 16, 1932, respectively, are not published but appear in the record on pages 8-9 and 25.

The opinion of the Court of Appeals was filed June 26, 1933, and appears on pages 32-38 of the Record. It is not yet officially reported.

JURISDICTION

The jurisdiction of this Court to issue the writ of *certiorari* is invoked under section 240 (a) (c) of the Judicial Code of the United States as amended by the act of February 13, 1925, 43 Stat. 938.

QUESTIONS PRESENTED

These are stated in the petition, *supra*, p. 2.

STATEMENT

A statement of the case is included in the petition, *supra*, pp. 7-8.

ERRORS TO BE RELIED UPON AND SUMMARY OF ARGUMENT

These are set out under the headings, "Petitioner's Contentions" and "Reasons for Granting the Writ" in the petition, *supra*, pp. 10-13.

ARGUMENT

I

The retirement of the officer and enlisted personnel of the Army is a function committed by the Constitution and the other laws of the United States solely to the President as Chief Executive and Commander in Chief. The President's act in finding every necessary fact required by the statutes authorizing retirement and thereupon placing petitioner upon the retired list, being without fraud and neither arbitrary, capricious nor unreasonable, and there being no provision for its riview, is final and conclusive and binding upon the Comptroller General as upon all others.

Article II, section 2, clause 1, of the Constitution provides that, "The President shall be Commander in Chief of the Army * * * of the United States * * *." Article I, section 8, clause 14, empowers the Congress "to make rules for the government and regulation of the land * * * forces,". These powers are distinct, and Congress may not by rules and regulations impair the authority of the President as Commander in Chief. *Swain v. United States*, 28 Ct. Cl. 173, affirmed 165 U. S. 553. "The power to make the necessary laws is in Congress; the power to execute in the President. * * * But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President." *Ex parte Milligan*, 4 Wall. 2, 139.

On February 2, 1901, Congress enacted section 36 of the Army Reorganization Act, 31 Stat. 757, *supra*, pp. 3-4, authorizing the President to enlist Filipinos "for service in the Army". Enlistments thereunder began October 1, 1901, upon which day petitioner enlisted in the United States Army. When the act of February 2, 1901, *supra*, became law and when petitioner enlisted thereunder, the statute governing retirement of enlisted men was the act of February 14, 1885, 23 Stat. 305, as immaterially modified, *infra*, Appendix, p. 29. The 1885 act was reenacted

by the act of March 2, 1907, 34 Stat. 1217, *supra*, p. 3. Both acts provide, in substantially the same language, that when an enlisted man shall have served 30 years in the Army, he shall upon making application to the President, be retired with 75 per centum of his active pay and allowances. The 1907 reenactment has remained in force continuously to the present, and under its authority petitioner's retirement was ordered.

Both acts constitute exercise by Congress of its constitutional power (Article I, section 8, clause 14, *supra*) "to make rules for the government and regulation of the land * * * forces". Both provide, in accordance with Article II, section 2, clause 1, that their execution shall devolve upon the President. Thus, proper correlation between the two constitutional duties is preserved.

THE DECISIONS OF THIS AND OTHER FEDERAL COURTS

This Court has recognized that the power to retire personnel of the Army is in the President, Congress having established the machinery therefor. In *United States ex rel. French v. Weeks*, 259 U. S. 326, the Court considered the operation of section 24b of the act of June 4, 1920, 41 Stat. 759, providing for reduction of the Army by retiring unfit officers. This section, in effect, required that, after hearing by a court of inquiry the record thereof be forwarded to a Final Classification Board, and "the findings of said classification board shall be final and not subject to further revision *except upon the order of the President*". (Italics supplied.) This Court, in construing the words above italicized said (p. 333):

> "The exception, plainly enough, was inserted * * * as a congressional recognition of the right in him as the Chief Executive and Commander in Chief of the Army (*a right which he probably would have had without it*), to interfere in such cases at his option, * * *". (Italics supplied.)

The Court of Appeals of the District of Columbia has, too, construed a retirement statute practically identical with the act of March 2, 1907, *supra*, p. 3. In *United States ex rel. Moser v. Meyer*, 38 App. D. C. 13, the relator, an officer of the Navy, was retired under section 1443, Revised Statutes, which provided:

> "When any officer of the Navy has been forty years in the service of the United States he may be retired from active service *by the President upon his own application*". (Italics supplied.)

Relator was retired by the President with a lower rank than that to which he believed himself entitled. The Supreme Court of the District of Columbia refused mandamus to compel the Secretary of the Navy to place his name on the retired list with higher rank. The Court of Appeals affirmed this decision, holding (p. 19):

> "Whatever, if any, duty the Secretary of the Navy has about the matter of placing names upon the retired list, it is not that he himself shall settle the question of grade or retirement, but after a determination of those questions by the President, with whom they lie, to give effect to his directions, * * *".

Subsequently, the Court of Appeals denied relator's application for a writ of error to remove the case to this Court (39 App. D. C. 370) and said (p. 371):

> " * * * it was decided simply that the subject of retirement was committed to the President of the United States as Commander in Chief of the Army and Navy, * * *."

It must follow that petitioner was retired by order of the President acting as Chief Executive and Commander in Chief of the Army, executing the law made by Congress to govern the retirement of enlisted men.

As a necessary corrolary of the commitment of the retirement of enlisted men by the Constitution and statutes to the President, the President has final power to determine the existence of the facts prescribed by Congress as necessary for retirement in each case. No proposition of law is better settled than that where an officer is created by law an instrument of the executive to ascertain the existence or nonexistence of a factual situation and no provision is made for review thereof, the action of the officer, in the absence of fraud or such manifest mistake as to amount to caprice, is final. *United States v. Wright*, 11 Wall. 648; *Nishimura Ekiu v. United States*, 142 U. S. 651; *Kaoru Yamataya v. Fisher*, 189 U. S. 86. This accords with the salutary principle that, when a question has been constitutionally committed to an executive officer for final determination, his decision cannot be reversed by any other, court or executive officer. *Johnson v. Towsley*, 13 Wall. 72; *Lem Moon Sing v. United States*, 158 U. S. 538. And, as such determinations are unassailable by all, so they cannot be reviewed and reversed by the Comptroller General. *Wright v. Yuchausti & Co.*, 272 U. S. 640.

That the general powers of the Comptroller General to settle and adjust claims and demands, and to state conclusive balances do not vest him with jurisdiction to review decisions of a department head, done as the representative of the President and within his legal competency is definitely settled by the decisions of this and other federal courts. These two powers, the first vested in accounting officers by the act of March 3, 1817, 3 Stat. 366 (reenacted as section 236, R. S., and now section 305, Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 23), and the second, by the act of March 30, 1868, 15 Stat. 54 (reenacted as section 191, R. S., and now included in section 304, Budget and Accounting Act, *supra*), are now in the Comptroller General by virtue of the first sentence of section 304 of the Budget and Accounting Act, 42 Stat. 20, 23.

As to the power to settle and adjust claims and demands, in the case of *United States v. Jones*, 18 How. 92, 96 (1855), holding that the Government could not recover back allowances paid defendant by the Secretary of the Navy, who had placed him on a special duty status entitling him thereto, but which had been disallowed by the accounting officers, this Court declared:

> "The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department * * *. His acts and decisions, in subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. *The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments*". (Italics supplied)

The quoted language was specifically reaffirmed by this Court in *United States v. Johnston*, 124 U. S. 236 (1888), denying mandamus against a treasury agent to compel recoupment of commissions paid him by the Secretary of the Navy under statutory authority, the Court saying that "In auditing these accounts they (the accounting officers) would have been bound to regard such action of the Secretary as final. *What was said in United States v. Jones, 18 How. 92, 96, may be repeated here* as applicable to accounts which have been finally acted upon by a head of department invested with authority * * *." (Italics supplied)

As to the power to state conclusive balances, the Court of Claims in *Billings v. United States*, 23 Ct. Cl. 166, held that accounting officers may not go behind orders of the Secretary of War directing travel, saying (p. 178): "It is not for accounting officers to inquire into the reasons, nor to take exception to * * * the orders of the President or a department head when issued within the general

scope of their authority", and that balances stated by the Comptroller are "not * * * conclusive upon the head of a department in the exercise of his discretion * * *".

This Court, in *United States v. Waters*, 133 U. S. 208, 215, adopting language of the Court of Claims, held that the Comptroller

> "has no power to review, revise or alter items * * * of expenditure or allowances made upon the judgment and discretion of other officers * * *. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances".

We therefore submit that it is settled law that the Comptroller General does not, under his general powers to settle and adjust claims and demands and to state balances, possess jurisdiction to go behind decisions of the President or department heads in matters committed to their several jurisdictions by the Constitution and the statutes. The Comptroller General, however, claims all-inclusive jurisdiction (6 Comp. Gen. 604, 606) by virtue of his power to make "advance decisions" under section 8 of the Dockery Act of July 31, 1894, 28 Stat. 208 (*supra*, p. 6).

The legislative history of this section (26 Cong. Rec. 4300) shows that its purpose was to legalize an existing practice, described by Attorney General Olney (20 Ops. Atty. Gen. 654), to enable disbursing officers and department heads to obtain from the Comptroller "pre-audits" of doubtful accounts, binding upon the auditors. Its scope is precisely co-incident with the Comptroller's power to settle and adjust claims and demands. It does not extend his jurisdiction, but relates solely to the time of its exercise; it permits him to decide in advance of payment only such questions as he might decide after payment. It does not purport to vest him with power to review *competent decisions* of the President or the heads of departments.

Smith v. Jackson, 241 F. 747, affirmed 246 U. S. 288, is the final authority upon this subject. The relator, then judge for the District Court of the Canal Zone, petitioned that court for mandamus against the Auditor, to compel payment of his compensation as fixed by law. The Auditor responded that he had received from the Comptroller of the Treasury an "advance decision" under section 8 of the Dockery Act, adverse to the relator, which precluded action by the court. Judge Clayton, in an opinion adopted by the Circuit Court of Appeals as its own, and which received the commendation of this court, said:

> "The salary of a judge who has served and for whose compensation specific appropriation has been made is not such a claim that affords any field for the operation of the Dockery Act."

OPINIONS OF THE ATTORNEY GENERAL

The pertinent views of the Attorneys General are all to the same effect. From the opinion of Attorney General Crittenden to the Secretary of War (5 Ops. Atty. Gen. 286) to the latest expression of that office, the opinion of Acting Attorney General Biggs to the Secretary of War, August 8, 1933, there is no deviation from the conclusion that accounting officers may not review the decision of the President or a department head in a matter committed to his jurisdiction. Almost the last official act of Attorney General Mitchell was to address the Secretary of Agriculture in a personally prepared opinion (37 Ops. Atty. Gen. 95-100, March 1, 1933) in which, citing the decision of this court in *Wright v. Ynchausti & Co.,* 272 U. S. 640, Mr. Mitchell said:

> "This decision confirmed the view previously taken by the Attorneys General * * * and it settled the proposition that under his general power to audit disbursements and settle accounts the Comptroller Gen-

eral cannot go beh[illegible] findings and decisions of the heads of the executi[illegible] departments in matters specially entrusted to their judgment by statute."

To the same effect are the several opinions of Attorney General Stone reported in 34 Ops. Atty. Gen. at pages 5, 162, 250 and 311. And as directly bearing upon the subject we cite 28 Ops. Atty. Gen. 181 (Wickersham) and 7 Ops. Atty. Gen. 453 (Cushing).

We submit, therefore, in holding that in such a case as this, the Comptroller General, when applied to, was required by law to review the act of the President, and that his decision was conclusive upon the executive, the Court of Appeals erred; that the law as established by the decisions of this Court, as set forth above, is precisely to the contrary, and that the Comptroller General was without jurisdiction to review the President's act retiring petitioner with pay.

II

The President's construction of the pertinent statutes resulting in his order retiring petitioner was clearly correct and, assuming for argument only that the Comptroller General acted within his jurisdiction in deciding that "the retirement of enlisted men of the Philippine Scouts is not authorized by the remotest implication of the laws", his decision was arbitrary, capricious, and unreasonable.

From the date of petitioner's original enlistment October 1, 1901, to that of the order of his retirement, October 31, 1931, the Philippine Scouts had been held by Congress, the War Department, and the accounting officers, including the Comptroller General, as a component part of the Regular Army.

The very act of February 2, 1901, *supra*, p. 3, section 36 of which provided for the creation of the Philippine Scouts, defined the organization as part of the Army. Section 1 of the act, 31 Stat. 748, provides:

"That from and after the approval of this Act *the Army of the United States,* including the existing organizations shall consist of * * * such other officers and enlisted men as may *hereinafter* be provided for: * * *." (Italics supplied.)

The act of May 16, 1908, 35 Stat. 163, provided that "the office of captain in the Philippine Scouts is hereby created as a grade of rank in the military establishment."

The National Defense Act of June 3, 1916, 39 Stat. 166 (Appendix, p. 29), specifically named the Philippine Scouts as part of the Regular Army, grouping them with the enlisted men of the Quartermaster Corps, the Medical Department, the Signal Corps and the unassigned recruits, all of whom were then and are now component parts of the Regular Army.

The act of June 4, 1920, 41 Stat. 758 (*supra,* p. 4) likewise names the Philippine Scouts as a part of the Regular Army, providing that "the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, *including the Philippine Scouts*".

The War Department has always held the Philippine Scouts a component part of the Regular Army:

1. In 1903 Elihu Root, then Secretary of War, so held in a ruling to the Bureau of Pensions, following which that Bureau has ever since paid pensions to Philippine Scout veterans as soldiers of the Regular Army.

2. Article 77 of the Articles of War (Military Code of 1874), section 1342, Revised Statutes, made officers of the Regular Army ineligible to sit on courts-martial to try officers or soldiers of other forces, except marines detailed with the Army. The War Department (Judge Advocate General) held officers of the Regular Army eligible to sit upon courts-martial to try members of the Philippine Scouts. C. 19272, C. 26772, Dig. Ops. J. A. G. (1912), 86, 1508.

3. The act of August 29, 1916, 39 Stat. 650, repealed the 1874 Code referred to above. Article 2 of the Code of

August 29, 1916, defined the persons subject to military law as (1) the officers and soldiers of the Regular Army; (2) cadets; (3) the officers and soldiers of the Marine Corps serving with the Army; (4) retainers to the camp; (5) persons under sentence of courts-martial; and (6) inmates of the Regular Army Soldiers' Home. This Code was superseded by that of June 4, 1920, 41 Stat. 787, which made no change in the definition of persons subject to military law except to add to (1), nurses, warrant officers and field clerks. Every military trial of members of the Philippine Scouts since 1917, of which there have been hundreds, has been had under the provisions of these Codes. Unless the Scouts are included in (1) as "officers and soldiers of the regular Army", they are not included at all and every trial so had has been illegal.

4. The Judge Advocate General of the Army has uniformly held the Philippine Scouts part of the Regular Army: Dig. Ops. J. A. G. (1906), 84; (1911) 158; (1911) 442; opinion dated May 15, 1929, approved by the Secretary of War; opinion dated October 17, 1930, approved by the Secretary of War; memorandum dated February 1, 1932, examining exhaustively all the authorities.

The Comptroller General himself in 3 Comp. Gen. 132, 135, held:

> "The Philippine Scouts, except as they are a part of the Regular Army, are not a component of the Army of the United States; and *the conclusion is irresistible that they are a part of the Regular Army,* * * *". (Italics supplied).

In his decision of January 31, 1925, A-6560, unreported, and again, in 4 Comp. Gen. 82, 83, he reiterated that:

> *"The Philippine Scouts are a part of the Regular Army* * * *."

The Director of Pensions, Veterans' Administration under date of May 24, 1932, notified The Adjutant General of the Army that enlisted men of the Philippine Scouts:

> "have consistently been recognized as having pensionable status as a part of the Regular Army * * *."

The only court ever passing directly upon the question, the Supreme Court of the Philippine Islands, held, in *Atkinson v. Stewart*, 23 Phil. 405, that the Philippine Scouts are a part of the Regular Army.

The enlisted men of the Philippine Scouts have, since October 1, 1901, been uniformly paid from the appropriation "*Pay of the Army*", and are now paid therefrom. From October 1, 1901, to June 30, 1902, the item applied to their pay was "for the pay of enlisted men", from which they in common with all other enlisted men of the regular army were paid with the approval of the accounting officers. Since June 30, 1902, the appropriation acts have provided for their pay, and that of other enlisted men of the Army, in separate items, a device frequently adopted by the Congress, in appropriating for the Army, to limit the maximum strength of specified organizations. Their allowances, however, which correspond in nature and kind with those of other soldiers of the Regular Army, have always been and are now paid from general appropriations applicable to enlisted men of the Army.

Never until the Comptroller General's advance decision of January 19, 1932 (R. 18-22) had it ever been questioned in theory or in practice that the Philippine Scouts were a part of the Army. All authorities were to one effect: the Philippine Scouts are a part of the Army. As such part of the Army, the enlisted members thereof are clearly entitled to retirement under the act of March 2, 1907, *supra*, p. 3, providing for the retirement with pay of enlisted men of the Army.

It should not be forgotten that military retirement causes no separation from the service, but a mere change in a continuing military status. Both the officers and enlisted men of the retired list, by the terms of section 2, act of June 4, 1920 (*supra*, p. 4), remain part of the Regular Army, subject to recall. The Comptroller General has even held (1 Comp. Gen. 700) that retired enlisted men hold office; and undoubtedly they hold positions of indefinite duration with pay attached.

It is idle to say, as the Court of Appeals seems to do, that the Comptroller General's decision did not affect petitioner's retired status, but only his right to retired pay. That "pay follows status" is almost a maxim. *Glavey v. United States*, 182 U. S. 595; *Whiting v. United States*, 35 Ct. Cl. 291, 301. If petitioner was retired at all, he was retired with pay, for, as this court said in *Denby v. Berry*, 263 U. S. 29, 35, construing Navy statutes similar to that involved here, "to be retired from active service under the * * * sections, *means retired with pay* and has had this meaning for many years." Retirement of enlisted men without pay is a thing unknown; and to hold an appropriation "for the pay of retired enlisted men" inapplicable to the pay of a retired enlisted man, is arbitrarily to thwart the plain terms of the law.

It is submitted, therefore, that the Comptroller General's decision on the merits and his position that no appropriation is available, is arbitrary, capricious, and unreasonable.

III

Petitioner's only plain and adequate remedy is in equity against the Comptroller General.

It has often been held that the superior courts of the District of Columbia have equitable jurisdiction to restrain the acts of officers of the United States in excess of their authority. *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *School of Magnetic Healing v. McAnulty*, 187 U. S. 94;

Bates & Guild Co. v. Payne, 194 U. S. 106; *Smith v. Hitchcock*, 266 U. S. 53; *McCarl v. Cox*, 8 F. (2d) 669; *McCarl v. Pence*, 18 F. (2d) 809. And these courts have continuously since their creation in 1801 had the power to compel a United States officer to perform a ministerial act. *Decatur v. Paulding*, 14 Pet. 497; *Cox v. United States ex rel. McGarrahan*, 9 Wall. 298; *United States ex rel. McBride v. Schurz*, 102 U. S. 378.

It may be that petitioner might maintain suit in the Court of Claims, wherein the Court of Appeals has held lies his only remedy, but such remedy would be neither plain nor adequate. "The objection, that there is a remedy at law, is only available where such remedy is as plain, adequate and effectual as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 214." *Sullivan v. Portland and Kennebec R. R. Co.*, 94 U. S. 806.

Petitioner's remedy in the Court of Claims is not plain. This Court said on May 29, 1933, in *Williams v. United States*, No. 728, reported in 77 S. Ct. 965 (advance sheets) that (p. 968):

> "It is equally certain that the judgments of the Court of Claims, where no appeal is taken, under existing laws are absolutely final and conclusive of the rights of the parties unless a new trial be granted by that court as provided by law."

This is undoubtedly the law. Yet, neither the Court of Claims nor any other court can enforce a judgment against the United States, however binding it may be; it is obvious that a writ of execution will not lie against the government nor can the Congress be compelled to appropriate to pay a judgment. The authors of this brief invite attention to the judgment of the Court of Claims in the case of *Dalton v. United States*, 71 Ct. Cl. 421, in which they represented the plaintiff, and payment of which, although twice regularly certified to Congress, has been denied up to the present time.

Petitioner's remedy in the Court of Claims is not adequate. That court has jurisdiction only to render money judgments. *United States v. Alire,* 6 Wall. 573. It could not, as the Supreme Court of the District can, compel payment of a judgment in petitioner's favor out of the appropriation made and available to pay him. Assuming petitioner successful in an action before the Court of Claims, the court could give judgment only up to the date the judgment might be rendered, and his right to receive pay in the future would depend upon successive suits for such pay as had accrued following the latest judgment in his favor: and for satisfaction of each such judgment, petitioner must await appropriation *at the will of Congress.*

Judge Jackson in *Smith v. Jackson, supra,* p. 21, had an alternative remedy by suit in the Court of Claims, but that fact did not oust the jurisdiction of the District Court of the Canal Zone to grant mandamus.

Petitioner submits that the Supreme Court of the District of Columbia has equitable jurisdiction of this case regardless of whatever right he may have in the Court of Claims.

CONCLUSION

For the reasons above set forth we respectfully submit that the writ of certiorari should be granted.

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APPENDIX

The act of February 14, 1885, 23 Stat. 365, provided as follows:

> "That when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as a private or non-commissioned officer, or both, he shall, upon making application to the President, be placed upon the retired list, with the rank held by him at the date of retirement: and he shall thereafter receive 75 per centum of the pay and allowances of the rank upon which he was retired."

The National Defense Act of June 3, 1916, 39 Stat. 166, provided:

> "That *the Army of the United States shall consist of* the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and *such other land forces as are now or may hereafter be authorized by law.*
>
> "Sec. 2. COMPOSITION OF THE REGULAR ARMY.—*The Regular Army of the United States, including the existing organizations,* shall consist of * * * (various organizations are enumerated, but the Philippine Scouts are not mentioned) * * * *such other officers and enlisted men as are now or may be hereafter provided for: Provided,* That hereafter the enlisted personnel of all organizations of the Regular Army shall at all times be maintained at a strength not below the minimum strength fixed by law: *Provided further,* That the total enlisted force of the line of the Regular Army, excluding *the Philippine Scouts and the enlisted men of the Quartermaster Corps, of the Medical Department, and of the Signal Corps, and the unassigned recruits,* shall not * * * exceed one hundred and seventy-five thousand men: * * * (Italics supplied.)